(3)

No. 08-1048

IN THE
SUPREME COURT OF THE UNITED STATES

LYNDA MARQUARDT,

Petitioner,

v.

KATHLEEN SIBELIUS, SECRETARY,
UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal agency may raise a timeliness defense in an employment discrimination complaint filed in federal court, where it knowingly accepted the underlying untimely administrative complaint, investigated it, and issued a final decision on the merits without ever raising the issue of timeliness.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY AND REGULATORY PROVISIONS INVOLVED

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

1. THE ISSUANCE OF AN AGENCY'S FINAL DECISION AFTER A LAWSUIT IS FILED SHOULD NOT AFFECT THE QUESTION OF AN AGENCY'S WAIVER OF THE TIMELINESS DEFENSE IN FEDERAL COURT.

On May 18, 2006, Lynda Marquardt filed a discrimination complaint in federal court because more than 180 days had passed since she initiated the administrative process. *29 C.F.R. 1614.310 (i)* . On May 25, 2006, counsel certified that on May 22, 2006, she had served the Secretary of the U.S. Department of Health and Human Services, the U.S. Attorney General, and the Office of the U.S. Attorney, Northern District of Texas, Dallas Division by U.S. Certified Mail, return receipts requested.

The return receipts show that U.S. Attorney, Northern District of Texas, was served on May 23, 2006, but the Secretary of the Department of Health and Human Services and the U.S. Attorney General were not served until May 30, 2006. That same day, the agency issued its final decision on the merits of Ms. Marquardt's administrative complaint, apparently unaware that she had filed a lawsuit. Therefore, the agency clearly intended that

its final decision would have legal effect, insofar as it would trigger the 90-day time period within which Marquardt could file a lawsuit in federal court. The final agency decision dismissing her administrative complaint had no legal effect other than the triggering of this time period. *29 C.F.R. 1614.110 (b).*

Whether a final agency decision is issued before or shortly after a lawsuit is filed does not change how that decision affects the plaintiff. The agency accepted, investigated and issued its decision without ever raising the issue of the complaint's timeliness. This, in conjunction with the fact that the policy of the agency's EEO office was to apply the 45-deadline only "loosely," led Marquardt to believe that the agency had, in effect, waived the 45-day deadline in her case. This reasonable belief encouraged her to pursue her lawsuit and incur many thousands of dollars in attorney fees and deposition costs. Had the agency raised the timeliness defense at any stage of the administrative process, Marquardt would have had to consider more carefully whether or not to continue her lawsuit.

The Government cites no authority for the proposition that whether or not an agency decision has "legal effect" has an impact on the question of waiver of the timeliness defense. The decision was, in fact, issued and the question of timeliness not raised. Therefore, it still falls within the ambit of the rule adopted by *Ester v. Principi*, along with other federal courts, that where an agency accepts a discrimination complaint, investigates it, and

issues a decision on the merits without raising the issue of timeliness, the agency is then deemed to have waived the defense in a subsequent lawsuit. *Ester v. Principi*, 250 F.3d 1068, 1071-1072 (7th Cir. 2001).

2. THE NINTH CIRCUIT RULE ON AN AGENCY'S WAIVER OF THE TIMELINESS DEFENSE IS UNFAIR TO POTENTIAL PLAINTIFFS BECAUSE AGENCIES RARELY FIND THAT DISCRIMINATION OCCURRED.

The Ninth Circuit rule, articulated in *Boyd v. USPS*, that waiver of the timeliness defense only occurs if the agency makes a finding that discrimination occurred, is not a good compromise between the Fifth Circuit rule and the rule established by the Seventh Circuit in *Ester*. *Boyd v. USPS*, 752 F.2d 410, 414 (9th Cir. 1985); *Ester*, 250 F.3d at 1071-1072. This is so for the simple reason that agency decisions, including those by the Department of Health and Human Services, rarely result in a finding of discrimination. One only has to look at the data posted by the Department of Health and Human Services on its public website, pursuant to the No Fear Act, to find support for this statement.[1]

In 2005, 2006, and 2007, the number of administrative complaints filed against DHHS amounted to 290, 249, and 271, respectively.

[1] U.S. Department of Health and Human Services, HHS.gov, http://www.hhs.gov/asam/oeeo/no_fear_bullet_4.html#activity.

However, in those same years, the total number of final actions finding discrimination were only five in 2005, three in 2006, and two in 2007. Such statistics cast doubt on the agency's enthusiasm for remedying discrimination and its willingness to make an adverse finding against itself.

3. THE COURT SHOULD FIND THAT THIS CASE IS AN APPROPRIATE VEHICLE FOR ESTABLISHING A UNIFORM RULE ON WAIVER OF THE TIMELINESS DEFENSE.

The Fifth Circuit rule bestowing what amounts to immortal status on an agency's right to raise a timeliness defense raises significant and recurring problems of fairness for discrimination plaintiffs. To let it stand would defeat the remedial purposes of this nation's anti-discrimination laws. In *Ester*, the Seventh Circuit has fashioned a just and reasonable rule that makes agencies responsible for their actions while still allowing them to raise an untimeliness defense at any stage of the administrative process.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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